IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-149

SAMUEL G. ALLEN, II,

Petitioner,

—v.—

BANKERS TRUST COMPANY and BUDINGTON, ST. JOHN & PARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO THE BRIEF FOR RESPONDENT BANKERS TRUST COMPANY OPPOSING THE GRANTING OF THE WRIT

The petitioner has petitioned the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled action. Respondent Bankers Trust Company has filed a brief opposing the granting of the writ. Respondent Budington, St. John & Park has waived its right to do so.

Respondent urges, in part, that the Court not consider the petitioner's Second Question (*Petition*, p. 2) because the question of the abrogation of the petitioner's right to trial by jury was not raised in the courts below.

Certain rights of litigants are so fundamental as to be taken for granted. The Court will review "fundamental" errors even though they may not have been specifically noted or previously argued; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941); *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *Ballard* v. *United States*, 329 U.S. 187 (1946); *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395, 412 (1946).

The matter of denial of the right of trial by jury does not comprise the whole of the petitioner's Second Question, but is only a part of it. The question reads:

> 2. Whether the District Court erred in ruling a collateral estoppel by a decree of a Connecticut Court of Probate which, under the laws of its sovereign, has no jurisdiction to determine the issues in question.

The probate court's lack of jurisdiction to try the issues in question was argued at every stage of the proceedings below. To have jurisdiction over a cause means to have the power to try the cause by any means to which the parties may be entitled and to grant appropriate relief. The constitutional implications, which are of special interest to this Court, are contained in the question of jurisdiction.

The petitioner's Second Question contains, as subsidiary questions, not only the question of improper denial of the right of trial by jury but that of which law the federal courts are to apply in ruling on questions of collateral estoppel by the decree of a state court. In its briefs to the lower courts respondent Bankers Trust Company urged that in deciding whether or not probate decrees are subject to collateral attack the federal courts will apply state law. However, inasmuch as the action was brought under a federal statute (*Petition*, p. 6) the District Court's obliga-

tion to do so under the rule of *Erie* v. *Tompkins*, 304 U.S. 64 (1938) is very much in doubt. At issue is a novel question in the matter of State versus Federal law.

In dealing lightly with such questions the Court of Appeals may have intended that they be reserved for consideration by this Court. The Court should not be dissuaded from hearing them.

Respectfully submitted,

SAMUEL G. ALLEN, II,
Petitioner, pro se.

September 13, 1971

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-149

SAMUEL G. ALLEN, II,

Petitioner,

—v.—

BANKERS TRUST COMPANY and BUDINGTON, ST. JOHN & PARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

SAMUEL G. ALLEN, II
Petitioner, pro se
P. O. Box 121, Village Station
New York, N. Y. 10014

THE ALPERT PRESS, INC., 644 PACIFIC ST., BROOKLYN, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-149

SAMUEL G. ALLEN, II,

Petitioner,

—v.—

BANKERS TRUST COMPANY and BUDINGTON, ST. JOHN & PARK,

Respondents.

PETITION FOR REHEARING

The petitioner prays for a rehearing of his Petition for a Writ of Certiorari, filed on July 31, 1971 and denied on October 12, 1971, to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled action.

1. *The question of the improper denial of the right to trial by jury was raised below.*

On page 7 of respondent Bankers Trust Company's Brief in Opposition it was stated that the question of the improper denial of the petitioner's right to trial by jury cannot be considered by this Court because it was not raised in the courts below. The petitioner prepared and filed a reply on the basis that the respondent's statement was

correct. It has since been discovered that the point was, in fact, raised below, as is to be found on page 29 of the Appellant's Brief to the Court of Appeals.

2. *The court below knowingly and deliberately denied the petitioner due protection of the laws of the United States.*

The action was dismissed by the United States District Court for the District of Connecticut for failure to state a claim upon which relief could be granted under the statutes invoked. The United States Court of Appeals for the Second Circuit affirmed the dismissal while knowing it to be in error.

The following facts appear from the record of the appeal: 1) The law of the case was examined and briefed in great detail in the Court of Appeals. 2) The arguments and briefs in that court clearly show the dismissal to be erroneous. 3) The Court of Appeals affirmed the dismissal by the lower court without distinguishing the arguments *contra,* or indeed without handing down an opinion of any kind because "no interest would be served" thereby.*

As it had done in *Matthies* v. *Seymour Mfg. Co.,* 270 F.2d 365 (1959), the Court of Appeals had again come to the defense of the now notorious Connecticut probate practice. In *Matthies,* the Court of Appeals (Lumbard, J.) had reversed the District Court and dismissed the action on the question of the number of interested parties plaintiff necessary to justify maintaining a class action. Because of the largely discretionary nature of this ruling, the

---

* *Lumbard, C. J.,* remark from the bench. The only comment made on the merits of the case was another remark from the bench (Kaufman, J.) that the petitioner had done "an excellent job."

Court was justified in denying certiorari (361 U.S. 962 (1960)). In the instant case, however, there is no room for discretion, and the dismissal is contrary to existing law.

Couched in language of high disdain, the opinion of the District Court, affirmed by the Court of Appeals (*Petition*, p. 1a), is nevertheless indefensible. No one has sought to have it reported. It draws its authority on the antitrust question from a criterion expressed in *United States* v. *International Boxing Club*, 348 U.S. 236 (1954), which had already been modified in *Radovitch* v. *National Football League*, 352 U.S. 445 (1957), and rejected, for all intents and purposes, thereafter (*Petition*, p. 7). It ignores the fact that the Connecticut probate courts have no jurisdiction to try contract disputes, and that any findings they may make or opinions they may render on such matters are, according to the principle of *Restatement*: Judgments §71, inconclusive. These points were examined and briefed in great detail in the Court of Appeals, which nevertheless saw fit to place the "interest" of the Connecticut Bar, as it saw it, outside the law. If the Bar exists to serve the public, rather than the reverse, the doctrine of "public policy" cannot justify such a ruling.

In *Radovitch* v. *National Football League*, *cit. supra*, at p. 454, this Court said:

> We think that Radovitch is entitled to an opportunity to prove his charges. Of course we express no opinion as to whether or not respondents have, in fact violated the antitrust laws, leaving that determination to the trial court after all the facts are in.

In the instant case the trial court and the Court of Appeals saw fit to decide that question before *any* facts were in.